In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-571

INDIANA AND MICHIGAN ELECTRIC COMPANY,
PETITIONER

v.

FEDERAL POWER COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL POWER COMMISSION IN OPPOSITION

OPINIONS BELOW

The original opinion of the court of appeals (Pet. App. 16a-27a) and its opinion on rehearing (*id.* at 1a-13a) are reported at 502 F.2d 336. The principal order of the Federal Power Commission (*id.* at 28a-38a) and its order denying rehearing (*id.* at 39a-50a) are reported at 48 FPC 304 and 740, respectively.

JURISDICTION

The judgment of the court of appeals (Pet. App. 14a) was entered on February 14, 1974. The court's order on rehearing (*id.* at 1a-2a) was entered on August 14, 1974. The petition for a writ of certiorari was filed on November 12, 1974. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the court of appeals exceeded its reviewing authority by invoking its equity powers to fashion a remedy that would minimize the hardship to the affected public that might otherwise have resulted from its holding in this case.

2. Whether the court's order improperly interfered with the Federal Power Commission's exclusive rate suspension and rate review powers under the Federal Power Act.

STATUTES INVOLVED

The pertinent portions of Sections 205, 206, and 313 of the Federal Power Act, as amended, 16 U.S.C. 824d, 824e, and 825*l*, are set forth at Pet. App. 51a-56a.

STATEMENT

1. On June 13, 1972, petitioner filed new tariff sheets with the Federal Power Commission, pursuant to Section 205 of the Federal Power Act, 16 U.S.C. 824d, proposing increased rates for sales of electric energy to its wholesale customers. Petitioner submitted all of the supporting evidentiary material required by the Commission's regulations under the Act (18 C.F.R. 35.0, *et seq.*), and it requested that its proposed rate increases be given an effective date of July 14, 1972.

On July 3, 1972, the Secretary of the Commission informed petitioner by letter that, under 18 C.F.R. 35.13 (b)(4)(i), the earliest date on which the company's proposed rate increase could be placed into effect was August 13, 1972. That section of the regulations requires that utilities seeking to increase their rates must file certain cost of service data and other documentary material with the Commission at least 60 days in advance of the proposed effective date of their new rates.

On August 11, 1972, the Commission issued the first of the orders involved in the present case, accepting petitioner's new tariff sheets for filing, suspending their effectiveness for five months until January 13, 1973, and scheduling a formal hearing on the lawfulness of the proposed increase (Pet. App. 28a-37a). Petitioner sought rehearing of the August 11 order, arguing that the 60-day regulation was unlawful because, as a practical matter, it enlarged the notice period for the effectuation of proposed increased rates beyond the 30 days specified in Section 205(d) of the Act, 16 U.S.C. 824d(d). Petitioner asked that the Commission modify its earlier order to provide that the prescribed five months' suspension of its rates begin on July 14, 1972, thus permitting petitioner to begin collecting the new rates, subject to refund, on December 14, 1972. The Commission denied rehearing in all respects (Pet. App. 38a-45a).

2. On review, the court of appeals found that "the practical effect of the section [the 60-day regulation] is to impose a *de facto* 60-day notice requirement on utilities seeking to increase their rates. Such a requirement contravenes the terms of Section 205(d) of the Federal Power Act" (*id.* at 22a-23a). Under that Section, the court held (*id.* at 25a):

> [Petitioner] was entitled to an effective date of 14 July 1972 for the rate schedule it filed on 13 June. The Commission therefore acted unlawfully by delaying the effective date until 13 August.

The court recognized, as had the Commission, that the Commission has no power under the Act to suspend rates which have already gone into effect (*id.* at 26a). It therefore held that, since "the lawful effective date of [petitioner's] rate filing was 14 July 1972, the Commis-

sion had no authority to suspend use of the new rate schedule on 11 August 1972," and the "suspension order of that date must be vacated" (*id.* at 27a).

3. In response to petitions for rehearing filed by the Commission and several intervenors, the court of appeals, in the exercise of its equity powers, modified its opinion to avoid the inequitable consequences that its initial order would have had. Under the original order, petitioner would have been free to collect the increased rates from its customers retroactively from July 14, 1972, without risk of refund obligations even if the Commission later determined that a portion of the increase was unjust and unreasonable.

The result would have been inequitable in two respects. First, permitting retroactive collection of the higher rates during the entire five months' suspension period "would create considerable hardship for [petitioner's] customers, for, in reliance on the Commission's suspension order, they failed to seek increases in their own rates to offset [petitioner's] increased charges" (*id.* at 3a-4a). Since those customers could not themselves raise their rates retroactively, "our original order would force them to absorb out of their own current assets the five months of retrospective increases in [petitioner's] rates" (*id.* at 4a). That would "impose a significant burden on the finances of [petitioner's] customers" (*ibid.*).

Second, since the Commission would be without power to order refunds of charges collected subsequent to the suspension period, petitioner's customers, and ultimately the consuming public, "would be forced to pay possibly excessive rates from 13 January 1973 until the conclusion of the Commission's ongoing hearings without any prospect of receiving refunds of the excessive amounts paid" (*id.* at 6a).

On the other had, the court found, "the equitable stake of [petitioner] in our main opinion is not significant," since it had originally "sought from the Commission no greater relief than our modified order now grants" (*id.* at 7a).

The court accordingly modified its original order to "reinstate the suspension of [petitioner's] rates for the period from 14 July 1972 through 13 December 1972, and restore to the Commission its power under Section 205(e) to order refunds of any amounts paid by [petitioner's] customers after 13 December 1972 that the Commission finds excessive" (*ibid.*). The court, relying on this Court's decisions in *Ford Motor Co.* v. *National Labor Relations Board,* 305 U.S. 364, and *United States* v. *Morgan,* 307 U.S. 183, reasoned that the modification was a reasonable exercise of the equity powers it possesses as a court sitting in review of an agency order (*id.* at 7a-13a).

ARGUMENT

1. Petitioner contends (Pet. 9-19, 23-25) that the court of appeals exceeded its authority as a reviewing court by invoking equity powers not conferred upon it by the Federal Power Act. Section 313(b) of the Act, 16 U.S.C. 825*l*(b), however, provides that a court of appeals reviewing an order of the Commission "shall have jurisdiction * * * to affirm, modify, or set aside such order in whole or in part." Just last Term this Court held, under the identical language of Section 19(b) of the Natural Gas Act, 15 U.S.C. 717r(b), that "[t]his jurisdiction to review the orders of the Commission is vested in a court with equity powers" (*Mobil Oil Corp.* v. *Federal Power Commission,* 417 U.S. 283, 311).[1]

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[1]The Court in *Mobil* upheld the authority of a court of appeals simultaneously to affirm an order of the Commission and to authorize the Commission in its discretion to reopen and reconsider the order if new information made it appropriate to do so. The Court recognized that "the Commission could not have reopened the order on its own" if the court of appeals' affirmance had been unqualified (417 U.S. at 310).

That is the controlling consideration in the present case. It was a proper exercise of the court of appeals' reviewing authority to fashion a remedy that would equitably accommodate the interests of persons affected by its decision. Petitioner does not claim that the court's order on rehearing is in fact inequitable or that it fails to put petitioner in the position the company would have occupied in the absence of the Commission's invalidated regulation.

2. Petitioner argues (Pet. 19-22), however, that the court's order impermissibly interferes with the Commission's exclusive authority to suspend proposed rate increases and to determine whether such rates are just and reasonable.

As the court of appeals correctly stated, however, "[t]he Commission explicitly determined that suspension was appropriate but failed to issue its suspension order in a timely fashion" (Pet. App. 10a-11a). Thus, far from interfering with the Commission's discretionary suspension power, the court's order "gives effect to the Commission's decision that suspension was appropriate" (*id.* at 10a-11a, n. 20). Unlike the situation in *Arrow Transportation Co.* v. *Southern Railway Co.*, 372 U.S. 658, on which petitioner relies, the effect of the court's order in this case is not to extend the five-month suspension period provided for by statute but rather to effectuate the Commission's determination to invoke its suspension authority for the maximum five-month period.

Similarly, the court's order does not invade the Commission's province to apply the statutory just and reasonable standard. To the contrary, the court "merely provided that if the Commission subsequently determines that the filed rates are unjust or unreasonable, it may order [petitioner] to refund the excess amounts paid by its customers" (*id.* at 11a).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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